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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HENRY GABRIEL PEREYRA, Defendant and Appellant.	E063076 (Super.Ct.No. RIF1409980) OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Annie Fraser, and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

Henry Gabriel Pereyra appeals from the judgment and sentence entered after a jury verdict finding him guilty of attempted felony criminal threat (Pen. Code, §§ 422, 664) and felony elder abuse (§ 368, subd. (b)(1))[1] against his mother, as well as misdemeanor malicious destruction of property (§ 594). Pereyra contends his convictions for elder abuse and attempted criminal threat must be reversed because the trial court erroneously excluded testimony by a rebuttal witness. He contends his conviction for felony elder abuse must be reversed because the trial court failed to sua sponte instruct the jury on the lesser included offense of misdemeanor elder abuse. (§ 368, subd. (c).) He contends his convictions on all three charges must be reversed due to prosecutorial misconduct. Finally, he contends we must reverse the imposition of 3 one-year sentence enhancements on two grounds—that he admitted only the fact of his convictions, not all the elements required under section 667.5, subdivision (b), and that the trial court did not advise him of his right to confront and cross-examine witnesses or his privilege against self-incrimination before taking his admission to the prison priors.

We affirm.

I

FACTUAL BACKGROUND

The District Attorney of Riverside County filed an information charging Pereyra with making a criminal threat (§ 422, count 1), elder abuse (§ 368, subd. (b)(1), count 2),

[1] Unlabeled statutory citations refer to the Penal Code.

and misdemeanor malicious destruction of property (§ 594, count 3). The information also alleged Pereyra had suffered four prison prior convictions within the meaning of section 667.5, subdivision (b).

On January 30, 2015, a jury found Pereyra guilty of attempted criminal threat, elder abuse, and malicious destruction of property, and the trial court found he had served four prison prior convictions. The trial court sentenced Pereyra to an aggregate term of six years in state prison, composed of a midterm sentence of three years for the elder abuse conviction, a stayed term of four months (one-third the midterm) for the attempted criminal threat conviction, a concurrent term of one year in county jail for the destruction of property conviction, and consecutive one-year enhancements for three of the prison prior convictions. The trial court struck one prison prior.

Pereyra's convictions arose from events on the evening of July 30, 2014 and the early morning of July 31, 2014, at the home where he lived with his 78-year-old mother. The jury heard testimony regarding these events from Pereyra's mother, Antonia Pereyra, his niece, Priscilla Pereyra, Riverside County police investigator Elizabeth Contreras, and Pereyra himself.

On July 30, 2014, Pereyra arrived at his mother's house around 10:00 p.m. or 11:00 p.m. Antonia was alone in the house and asleep in her bedroom. At some point, Antonia was awoken by a loud bang and the sound of Pereyra talking outside her room. According to Antonia, Pereyra was talking and arguing. She refused to repeat what he said, because she does not "like to cuss, and he says bad words." She also testified that

Pereyra was speaking in English and she "couldn't understand him." Asked whether she "understand[s] English a little bit," she responded "Yes," but then testified that "[r]ight now I don't remember anything of [what he said]." She testified Pereyra argues in a similar fashion "at least two or three times a week," and she attributes his behavior to drug use.

When Antonia came out of her room she found Pereyra standing at the door to his room with a hammer in his hand. Antonia said she told him she was "going to call [his brother] Saul because now you're causing problems." She then took her keys and cell phone, went next door where her son Angel lives, and called her son Saul. She testified that she calls Saul or pretends to call Saul to diffuse the situation when Pereyra argues with her. Antonia testified that on the night in question she was afraid to be in the house alone with Pereyra.

About 10 minutes until midnight, while Antonia was waiting outside, her granddaughter, Priscilla, came home with her boyfriend. Antonia told Saul that Priscilla had come home and he no longer needed to come to the house. At that point, Antonia and Priscilla went back into Antonia's house. Antonia told Priscilla to go to her room because Pereyra "was mad." Priscilla and her boyfriend went to her room and went to sleep. Priscilla testified she did not see Pereyra. Antonia went to her own bedroom and noticed two holes in her bedroom door. Antonia testified she believed Pereyra had made the holes, but did not know whether he used the hammer to make them. She went into her room, locked the door, and went back to sleep.

Later, Priscilla was awoken by a banging sound. Priscilla testified it sounded like someone banging on a door and came from the direction of Antonia's door. She then heard Pereyra and Antonia arguing outside her bedroom, though she could not hear what they were saying. According to Priscilla, Pereyra also banged on her door and threatened to beat her up.

About 4:00 a.m., Antonia's son, Alvaro, came to the house and woke her up to report that Pereyra had slashed the tires of Priscilla's car. According to Antonia, Alvaro called the police and told her they were on their way. According to Priscilla, Antonia also spoke with the police on the telephone, but Antonia denied doing so. However, the parties stipulated that a "9-1-1 call occurred at 4:45 a.m. on the morning of July 31, 2014, for a service call at 5364 Coonen Drive in the city of Riverside," the address of Antonia's house. When Saul arrived, Antonia showed him the holes in her bedroom door and said, "Look what your brother did."

Contreras responded to the call to the police at approximately 5:00 a.m. Contreras testified she understands Spanish and speaks "broken Spanish." She testified she and Antonia spoke in a combination of English and Spanish, that Antonia appeared to understand, and responded to her questions. Antonia testified she spoke to a female officer and they were able to communicate clearly in Spanish. Antonia told the police she had gotten into an argument with Pereyra, that he had a hammer in his hand, and that he was yelling at her. Contreras testified Antonia told her Pereyra had struck her door with a hammer and threatened her by saying, "You're dead, stupid." According to

Contreras, Antonia also told her she feared for her life and she believed Pereyra would carry out his threats. Pereyra was locked in his bedroom when Contreras arrived. After he had been removed, Contreras found a hammer on the dresser in Pereyra's room. Contreras "placed the hammer to the holes" in the bedroom door "and it fit." After these events, Antonia went to civil court and applied for a restraining order against Pereyra, seeking to stop him from returning to her home.

At trial, Antonia contradicted the evidence concerning Pereyra's alleged threats. She denied telling law enforcement that she was afraid because Pereyra threatened her. Instead, she testified, "I said that I was afraid because perhaps he would do something, and that's very different." She also denied hearing Pereyra say, "You're dead, stupid." According to Antonia, Alvaro and his girlfriend filled out the application for a restraining order. She testified they wrote that Pereyra "wanted to kill me," and that the claim was false.

Pereyra testified in his defense that he loves his mother and does not want to harm her. He testified he "may have got high" earlier in the day of these events. However, he denied seeing Antonia or Priscilla that night, denied using a hammer to punch holes in his mother's bedroom door, and denied slashing Priscilla's tires. Instead, he contended that he got into an argument with his brother Alvaro, who retrieved a weapon. According to Pereyra, he retreated to his bedroom carrying a chair, "[a]nd when [Alvaro] was coming at me, I turned around to look like this to see that he wouldn't strike me or anything, and when I did that, when I was turning into my room, the two legs of the chair hit my

mother's door and punctured those two holes in there, and that was that loud noise and the banging noise on her door." Pereyra testified he went into his room and shut the door. He said he never argued with his mother, never said, "You're dead, stupid" to her, did not curse, and did not threaten to harm or kill anyone.

II

DISCUSSION

A. *Exclusion of Rebuttal Witness*

Pereyra contends the trial court erred by refusing to allow him to present Saul Pereyra "as a witness to the police interview with Antonia Pereyra, to impeach the credibility of Contreras as to her testimony that Antonia Pereyra appeared to have understood the officer's questions." Pereyra argues the trial court erred by excluding Saul's testimony and that doing so denied Pereyra's rights to due process and a fair trial.

1. *Background*

Pereyra sought to introduce the testimony of his brother, Saul Pereyra, to impeach the testimony of Contreras related to her interview of Antonia Pereyra. The prosecution objected to the testimony.

Defense counsel made an offer of proof regarding Saul's testimony. He represented Saul "would testify to the nature of the conversation. I believe that the officer testified that she was able to communicate effectively with Antonia, and it was her layperson's opinion that Antonia appeared to understand. It's the—it's the impeachment of Officer Contreras that Saul was there as well, witnessed at least part of the interview,

and from his layperson's opinion, it didn't flow well. They didn't seem to communicate well. . . . Antonia seemed confused by the questions, by the order of the questions, by how it was asked, and I think that's the impeachment of how the interview was conducted and the layperson's opinion of Officer Contreras that she apparently understood and was able to communicate clearly with the officer."

The trial court refused to allow the testimony. The court noted it "has received testimony from Antonia herself that she did understand the communications between herself and Officer Contreras. Both sides had ample opportunity to explore that issue with Antonia. There's nothing that's been presented to cause that—evidence that there was any confusion. [¶] For Saul to come in and say that it was his lay opinion that there was confusion between the conversation of Officer Contreras and Antonia is not relevant, nor is it helpful to the trier of fact. Saul cannot speculate about—he can only speculate about what Antonia understood and about what Officer Contreras understood in the communications between the two because the communications were between the two." The trial court sustained the prosecutor's objection and barred Saul's testimony.

2. *Probative value of the excluded testimony*

Trial courts have broad discretion to exclude evidence at trial. (*People v. Jones* (2013) 57 Cal.4th 899, 949.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Here,

the court determined Saul's testimony was not sufficiently probative of the general purpose for which it was offered—impeaching Contreras's credibility on the issue of whether she and Antonia communicated effectively during their interview—to overcome the possibility of jury confusion from allowing him to speculate about "what Antonia understood and about what Officer Contreras understood." We review the trial court's exercise of discretion for abuse. (*People v. Pearson* (2013) 56 Cal.4th 393, 457.)

Evidence may be legally relevant but still have little persuasive value because of its conjectural or inferential nature. (See, e.g., *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1844.) The weaker the logical link between the proffered evidence and the desired inference, the lower the probative value of the evidence. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) Here, the point of introducing Saul's testimony that Antonia and Contreras did not communicate effectively in general was to support the conclusion that Contreras misunderstood Antonia to have reported that Pereyra threatened her. The link between the two is quite weak. First, Antonia testified she and Contreras were able to communicate clearly in Spanish. Contreras testified she understands Spanish, speaks "broken Spanish," and that Antonia appeared to understand and responded to her questions. Pereyra's opinion regarding his mother's ability to understand Contreras is of limited use compared with Antonia's and Contreras's direct reports. Second, it is only on the point whether Pereyra threatened his mother that their testimony of the conversation differed. Saul's testimony, if admitted, would support a general failure of understanding, not a failure limited to one specific point in the prosecution's case against Pereyra.

Because of the tenuous inferential link between Saul's lay opinion as to whether his mother and Contreras were communicating well and the defense he sought to support with that evidence, the trial court was justified in concluding the proffered evidence was "speculative" and of minimal probative value. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1165 ["defendant offered only . . . supposition" concerning witness bias, "which the trial court properly excluded as too remote and speculative"].) Considering the nature of the proffered defense evidence, the court's ruling "simply foreclosed evidence of such speculative and marginal impeachment value it was likely to confuse or mislead the jury." (*Id*. at p. 1166.) We find no abuse of discretion.

3. *Pereyra's ability to present a defense*

"'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citation.]" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) "Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is [the harmless error standard] announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension." (*People v.*

Fudge (1994) 7 Cal.4th 1075, 1103; accord, *People v. McNeal*, *supra*, at p. 1203 ["Because the trial court merely rejected some evidence concerning a defense, and did not preclude defendant from presenting a defense, any error is one of state law and is properly reviewed under *People v. Watson*"].)

Having reviewed the record, we conclude there is no reasonable probability that the outcome would have been more favorable for Pereyra had the court permitted Saul to testify his mother did not appear to communicate effectively with Contreras. Despite the exclusion, Pereyra presented to the jury his defense theory that Contreras's testimony was unreliable and that Antonia did not report a threat. His counsel elicited testimony from Antonia that she did not say that Pereyra had threatened her. He elicited Antonia's testimony that she did not understand English well. He also elicited Contreras's testimony that she spoke only "broken Spanish." The jury thus had the materials to infer that Contreras had misunderstood Antonia and misreported her as saying Pereyra said, "You're dead, stupid." Saul's testimony would have added little more support to this inference, especially because he did not propose to deny Antonia had reported the threat, but only that she did not act as if she understood Contreras as a general matter.[2]

[2] Pereyra concedes the point that Saul's testimony would have served only to add support to a theory he presented to the jury, claiming "there would have been more evidence of the miscommunication had the trial court not erred in prohibiting the defense from putting Saul Pereyra on the stand."

B. *Misdemeanor Elder Abuse as a Lesser Included Offense*

Pereyra contends the trial court committed prejudicial error by failing to instruct the jury sua sponte on misdemeanor elder abuse (§ 368, subd. (c)) as a lesser included offense of felony elder abuse (§ 368, subd. (b)(1)). We disagree.

Felony elder abuse occurs when the offender "under circumstances or conditions *likely to produce* great bodily harm or death, willfully causes or permits any elder or dependent adult," with knowledge that he or she is an elder or a dependent adult, "to suffer, or inflicts thereon unjustifiable physical pain or mental suffering." (§ 368, subd. (b)(1), italics added.) The victim need not actually suffer great bodily harm; it is sufficient to establish felony elder abuse that the force used created a substantial risk of great bodily injury. (*Roman v. Superior Court* (2003) 113 Cal.App.4th 27, 35.) Misdemeanor elder abuse occurs when the offender "under circumstances or conditions *other than those likely to produce* great bodily harm or death, willfully causes or permits any elder or dependent adult," with knowledge that he or she is an elder or a dependent adult, "to suffer, or inflicts thereon unjustifiable physical pain or mental suffering." (§ 368, subd. (c), italics added.)

"As is relevant here, the difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is perpetrated 'under circumstances or conditions likely to produce great bodily harm or death.' If it is, the crime is a potential felony. (§ 368, subd. (b)(1).) If it is not, the crime is a misdemeanor. (§ 368, subd. (c).) Misdemeanor elder abuse is a lesser included offense of felony elder abuse. [Citations.] [¶] A trial

court must instruct on a lesser included offense if there is substantial evidence from which a reasonable jury could conclude the defendant is guilty of the lesser offense, *but not* the charged offense. [Citation.] 'In deciding whether evidence is "substantial" in this context, a court determines only its bare legal sufficiency, not its weight.' [Citation.] If there were such evidence, we as the reviewing court then ask whether the error requires reversal of the defendant's conviction for the greater offense. [Citation.]"[3] (*Racy*, *supra*, 148 Cal.App.4th at pp. 1334-1335, italics added.)

Accordingly, at issue here is whether there was substantial evidence from which a jury could have found Pereyra committed elder abuse under circumstances or conditions that were *not* likely to produce great bodily injury or death and therefore committed misdemeanor elder abuse, not felony elder abuse.

Defendant contends *Racy* supports finding error. As in this case, the defendant in *Racy* argued the trial court erred in failing to instruct on the lesser included offense of misdemeanor elder abuse. (*Racy*, *supra*, 148 Cal.App.4th at p. 1330.) In *Racy*, there was evidence defendant "zapped" the 74-year-old victim in the leg with a stun gun, inflicting

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3 "In a noncapital case, the error in failing to instruct on a lesser included offense is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] which requires reversal of the conviction for the greater offense 'if, "after an examination of the entire cause, including the evidence" [citation], it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred.' [Citation.] Probability under *Watson* 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1334-1335 (*Racy*).) Finding no substantial evidence to support a misdemeanor elder abuse conviction, we do not reach the issue of prejudice.

a pain the victim described as similar to a "poke" from an ice pick. (*Id.* at pp. 1330-1331.) The victim attempted unsuccessfully to retreat to his bedroom, but managed to get in a defensive position on the bed. Evidence showed the defendant then demanded the victim give him money, zapped the stun gun in the air, tipped the victim over, struggled with him and grabbed his wallet, tearing his pocket. (*Id.* at p. 1331.) The victim did not seek medical attention because there was no evidence of burns or other injuries to his leg. (*Ibid.*)

The Third District Appellate Court concluded the trial court should have instructed the jury on the lesser included offense of misdemeanor elder abuse. (*Racy*, *supra*, 148 Cal.App.4th at pp. 1335-1336.) The court noted the victim "did not suffer great bodily harm during the incident, so the jury was left to draw inferences about whether the circumstances or conditions under which defendant inflicted physical pain or mental suffering were likely to produce great bodily harm or death." (*Id.* at p. 1335.) The court found it "reasonable the jury could have viewed [the victim] as a rather large man who was not likely to suffer great bodily injury or death during the incident despite his age and physical limitations." (*Id.* at p. 1336.) Further, the court noted the jury was unable to "reach a verdict on whether defendant assaulted [the victim] with the stun gun." (*Ibid.*) The court concluded there was a "'reasonable chance' defendant 'would have obtained a more favorable outcome' had the jury been instructed on misdemeanor elder abuse." (*Ibid.*)

We find *Racy* distinguishable. The *Racy* defendant wielded a stun gun, "tripped," and "tipped" the victim, conditions that were not necessarily likely to cause great bodily injury or death to the victim. As the *Racy* court concluded, expert testimony would have been necessary to support a felony elder abuse conviction based on the use of the stun gun, "because the effects of a stun gun, unlike the effects of more typically used weapons such as knives or handguns, are matters beyond the experience of average jurors." (*Id.* at p. 1333.) Since there was no expert testimony and the victim did not suffer great bodily injury, the jury could reasonably have concluded the stun gun could not inflict such an injury, requiring the court to give the lesser included instruction. Here, Pereyra talked and argued with Antonia through her bedroom door while swinging a hammer with enough force to puncture the door, blows the jury would have understood based on common sense as likely to inflict serious injury or death if they struck Antonia. The only reasonable finding a jury could have made if it concluded Pereyra was responsible for the crime was that the offense was committed under circumstances or conditions likely to produce great bodily harm or death. There was no evidence from which the jury could conclude, as in *Racy*, that the violence inherent in Pereyra's attack could have caused only minor injury.

It is also important that the jury in *Racy* could not reach a verdict on whether the defendant committed assault with the stun gun. The lesser included instruction was required because the jury could have found the defendant tipped and tripped the defendant, but did not use the stun gun, which would have supported a verdict of

misdemeanor elder abuse. Here, the only evidence that Pereyra did not use the hammer was his own testimony that he hit Antonia's door accidentally with the legs of a chair. But that testimony is not substantial evidence he was guilty of the lesser crime, because, if accepted, it would have established he was not guilty of any form of elder abuse. It is well-settled that "instructions on lesser included offenses are not required when the evidence shows that, if guilty at all, [the] defendant committed the greater crime." (*People v. Lema* (1987) 188 Cal.App.3d 1541, 1545.)

C. *Prosecutorial Misconduct*

Pereyra contends his convictions must be reversed because several instances of prosecutorial misconduct deprived him of a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

1. *Prosecutor's misstatement of the burden of proof*

Pereyra contends the prosecution misstated the beyond-a-reasonable-doubt standard of proof in closing arguments to the jury, and that the error requires reversal. We disagree with Pereyra's characterization of the prosecutor's argument.

At the end of closing argument, the prosecutor described the reasonable doubt standard of proof in the following terms: "Now, what's beyond a reasonable doubt? The proof leaves you with an abiding conviction that the charge is true. That's what beyond a reasonable doubt is. Now, you can have some doubts and you can still convict the defendant. Because remember, it's beyond a reasonable doubt, not all doubt." The prosecution also told the jury, "So if the People's theory is reasonable and the defense's

theory is reasonable, if both are reasonable, the tie goes to the defendant. He's not guilty. That's what the law requires. However, if the People's theory is reasonable and the defense theory is unreasonable, the defendant is guilty." In rebuttal, the prosecutor explained: "You are the judges of the facts. You decide whether the event happened one way or the other way, whether the story that the defendant gave is reasonable. If it is, though, you should come back not guilty. If it's not reasonable and if the facts that we presented to you is a more reasonable interpretation of the facts, then it requires a guilty verdict." Defense counsel objected to the last two statements as misstating the law.

A prosecutor "commit[s] misconduct insofar as her statements could reasonably be interpreted as suggesting to the jury [the prosecutor] did not have the burden of proving every element of the crimes charged beyond a reasonable doubt." (*People v. Hill* (1998) 17 Cal.4th 800, 831, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Here, the prosecution's discussion of the reasonable doubt standard was not misleading. The trial court directed the jury that the prosecution had the burden to prove

all elements of the charges beyond a reasonable doubt, and explained "[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt." The prosecution correctly described the standard to the jury in nearly identical terms, stating, "Now, what's beyond a reasonable doubt? The proof leaves you with an abiding conviction that the charge is true. That's what beyond a reasonable doubt is. Now, you can have some doubts and you can still convict the defendant. Because remember, it's beyond a reasonable doubt, not all doubt."

The prosecution also correctly expanded on the idea that the reasonable doubt standard of proof did not require the People to overcome all possible doubt or doubt that is unreasonable. (§ 1096 ["Reasonable doubt . . . is not a mere possible doubt"]; *People v. Romero* (2008) 44 Cal.4th 386, 416 [approving prosecutor's argument that jury must "'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable'"].) The prosecution explained proving guilt beyond a reasonable doubt does not mean proving guilt beyond "all doubt" and that "if the People's theory is reasonable and the defense's theory is reasonable, if both are reasonable, the tie goes to the defendant. . . . However, if the People's theory is reasonable and the defense theory is unreasonable, the defendant is guilty." Here, the prosecutor statement simply explained the jury should *not* vote to acquit based on defense counsel's explanations of the evidence unless those explanations were reasonable. That is, the prosecutor correctly told the jury it should not acquit based on unreasonable doubt.

Pereyra contends *People v. Ellison* (2011) 196 Cal.App.4th 1342 requires a different result. We disagree. In *Ellison*, this court determined the prosecutor crossed the line by arguing that "the jury instructions tell you that if there's two reasonable interpretations of the evidence, one points to guilt, one points to innocence. You have to vote not guilty because that's fair, because that means it's reasonable that the defendant is innocent," and that "[b]eyond a reasonable doubt is what the evidence that you're given [*sic*]. Is it reasonable that the defendant's innocent." (*Id.* at pp. 1351-1352.) The error in *Ellison* was the error of stating the defense was required to present evidence or argument to establish it would be reasonable to conclude the defendant was innocent. As we discussed above, the prosecutor in this case did not make that argument. Instead, he argued Pereyra could not defeat the prosecution case by offering interpretations of the evidence to induce unreasonable doubt. We conclude there was not a reasonable likelihood the jury understood or applied the prosecution's comments in an improper or erroneous manner.

2. *Prosecutor's display of the application for a temporary restraining order*

Pereyra contends the prosecutor committed misconduct by displaying on an overhead projector the first page of the application Antonia filed for a temporary restraining order (TRO) against Pereyra because the application included a statement about "the use of gun or other weapons in there with the initials A.P." According to Pereyra "this was a clear attempt to smuggle before the jury highly prejudicial material that the prosecutor had no reason to believe could be proved."

We have reviewed the record and find no basis for concluding the display of the page of the TRO application constituted misconduct. The prosecution used the application to show Antonia had made a prior inconsistent statement about Pereyra's threat. As Pereyra concedes, the trial court initially permitted its use for that purpose. After introducing the application, the prosecutor asked Antonia whether she had crossed out certain statements in the document and initialed it. Antonia denied writing on the document, and then defense counsel objected to its introduction on the basis that it contained hearsay. At a sidebar, outside the presence of the jury, the trial court noted its concern with the statement about guns, confirmed its ruling that portions of the document were relevant to show Antonia had made a prior inconsistent statement, and ruled that the statement regarding guns and weapons could not be displayed to the jury. The prosecution proceeded to question Antonia about whether she altered the application without displaying the statement about guns.

There is no basis in the events that transpired to implicate the authorities Pereyra cites, which involve questioning witnesses about prejudicial inadmissible information. (See *People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 377 [improper cross-examination of witness as to whether he made a statement based on inadmissible triple hearsay report]; *Douglas v. Alabama* (1965) 380 U.S. 415, 419-420 [questioning witness who invokes right against self-incrimination about the details of his confession deprived defendant of his right to confront witness].) Here, the prosecutor displayed the statement about guns

to the jury only briefly and asked no questions related to the portion of the document related to weapons.

3. *Prosecutor's argument regarding facts not in evidence related to the TRO*

Pereyra contends the prosecutor committed prejudicial misconduct by arguing on two occasions facts not in evidence related to the TRO Antonia sought against Pereyra. First, he complains of the argument that the jury should credit the evidence that Pereyra threatened Antonia because the TRO application said he did and Antonia had the opportunity to fix that claim, but did not. According to Pereyra, there was no evidence that Antonia had an opportunity to correct the application. Second, he complains the argument that a TRO must be based on something is based on the prosecutor's standing and authority, not evidence in the record. Pereyra contends "argument of facts not in evidence, is a practice that is 'clearly misconduct.'"

In closing argument, the prosecutor raised the fact that Antonia filed an application for a TRO against Pereyra after their altercation. The prosecutor stated that Antonia "said that someone else had filled it out. This was an opportunity for her to fix any of those mistakes, and she didn't. She didn't address any of those things." Defense counsel objected that the statement contained facts not in evidence, and the trial court sustained the objection and admonished the jury that it was to consider as evidence only the sworn statements of witnesses and admitted exhibits.

The prosecutor also argued, "Now, regardless of what—what was written in the application, regardless of who actually wrote it, you can't just go to a court and just get a

temporary restraining order based on nothing. . . . The temporary restraining order itself, that is enough in and of itself to realize that she was in fear of him and that he had threatened her." As Pereyra concedes on appeal, defense counsel did not object to this argument at trial.

"Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) A prosecutor commits misconduct by arguing facts not in evidence "because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor."'" (*People v. Hill*, *supra*, 17 Cal.4th at p. 828.) However, there is no misconduct if what the prosecutor states is a matter of common knowledge or appeals to common experience. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.)

Here, the prosecutor appealed to the jury's common sense and common knowledge. Antonia testified her son and his girlfriend filled out the TRO application for her and that she signed it. The application, written in English, included the claim that Pereyra had threatened her. At trial, Antonia disavowed that part of the application. The prosecutor's argument did nothing more than suggest there was reason to question Antonia's testimony now and to credit the claim in the application because it would have been natural for Antonia to review the application and correct any errors before signing or before presenting it to the court. Similarly, the prosecutor's argument that seeking and

obtaining the aid of law enforcement to keep Pereyra away from her home indicates their altercation was more than a garden variety domestic dispute, was simply an appeal to common sense. Indeed, the prosecutor supported the argument with an illustration from common experience by arguing, "For instance, if I got angry with my girlfriend, I wouldn't be able to call the cops, get a restraining order, and force her to move out without something." (*People v. Wharton*, *supra*, 53 Cal.3d at p. 567 ["counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience"].) We conclude, therefore, that the prosecutor's arguments did not amount to prosecutorial misconduct.

4. *Prosecutor's statements vouching for witness's reliability*

Pereyra contends the prosecution committed misconduct by vouching for the credibility of a witness. We disagree with Pereyra's characterization of the prosecutor's statement.

In his rebuttal to defense counsel's closing argument, the prosecutor said to the jury, "Officer Contreras told you what—what Antonia told her and what Priscilla told her. The report itself, there was nothing that I saw or heard that was inconsistent with what Antonia and Priscilla told her. I think it was consistent." Defense counsel did not object to this portion of the prosecution argument.

Pereyra contends the statement represents "the prosecutor's personal belief in the reliability of a prosecution witness [and] obviously implies that the prosecutor has information on the subject in addition to the evidence introduced at trial." He argues

such "vouching for the credibility of witnesses creates the danger that his comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and thus jeopardize the defendant's right to be tried solely on the basis of evidence presented to the jury."

This characterization of the prosecutor's comment is mistaken. The prosecutor was responding to defense counsel's argument that Contreras's report was deficient. For example, defense counsel argued that "Officer Contreras admitted she had errors in her report. . . . [S]he admitted she made errors. She admitted it wasn't complete. She admitted things were missing." Counsel then proceeded to give examples of those deficiencies. The prosecution's comments simply argued that, errors and omissions notwithstanding, there was nothing inconsistent between what Contreras wrote in her report and her testimony about what Antonia and Priscilla told her. Thus, the prosecutor limited himself to arguing the facts, not Contreras's credibility as a witness. Accordingly, we conclude this ground for reversal has no merit.

5. *Prosecutor's repetition of questions about Pereyra's threat*

Pereyra contends the prosecutor committed misconduct by repeatedly asking Antonia whether Pereyra had threatened her and said, "You're dead, stupid" to her after she had already denied that he had done so. According to Pereyra, these questions violated the rule that prosecutors may not ask questions "for the purpose of insinuating prejudicial matter not properly admissible in evidence."

We have reviewed the record, and it is plain the prosecutor in this case did not engage in questioning designed to insinuate inadmissible evidence into the proceedings. First, the jury had already heard evidence that Antonia previously accused Pereyra of threatening her. Contreras testified that Antonia told her Pereyra had threatened her and said to her, "You're dead, stupid" on the night of the confrontation. In addition, the jury heard evidence that Antonia sought a TRO against Pereyra that included the accusation that he had threatened her. As a result, the prosecutor's questions did not seek to suggest facts not in evidence that could not otherwise have been presented to the jury. The authorities Pereyra cites are therefore distinguishable. (See *People v. Wagner* (1975) 13 Cal.3d 612, 619-620 [misconduct to ask questions about otherwise inadmissible prior involvement in drug sales]; *People v. Bell* (1989) 49 Cal.3d 502, 532-533 [misconduct to ask question about hearsay statement in a report by a person not available to testify at trial].)

Second, the prosecution had a legitimate reason for asking these questions. At trial, Antonia denied accusing Pereyra of making a threat, and the prosecution's theory

was she had changed her testimony to protect her son. In pursuit of that theory, the prosecution asked Antonia several questions related to the alleged threat—whether Pereyra had threatened her, whether she told law enforcement, her granddaughter Priscilla, or anyone else that Pereyra had threatened her, and whether she had accused Pereyra of threatening her in an application for a TRO. The evident purpose of these questions was to test whether Antonia's changed story would hold up and to allow the jury to judge the credibility of her testimony. We therefore conclude the prosecutor's questions regarding Pereyra's threats do not implicate the rule against bringing otherwise inadmissible facts to the attention of the jury.

6. *Prosecutor's disparaging comments about defense counsel's tactics*

Pereyra contends the prosecutor committed misconduct requiring reversal by characterizing several arguments of defense counsel as "smoke screens" or "sidetracks." We disagree.

First, we do not find the prosecutor's comments about defense counsel's arguments rise to the level of misconduct. In *People v. Bain* (1971) 5 Cal.3d 839, our Supreme Court reversed a conviction based, in part, on "[t]he unsupported implication by the prosecutor that defense counsel fabricated a defense." (*Id.* at p. 847.) In *Bain*, the victim testified that the defendant had followed her off a bus, accosted her with a knife, and raped her. Defendant testified in his own defense and told the jury he "pick[ed] . . . up" the victim at a bus stop, made out with her on the bus, disembarked with her, and they engaged in consensual sex. (*Id.* at p. 844.) Defendant's story included elaborate

detail. (See *ibid.*) During trial, "the prosecutor asserted before the jury that the defendant and his counsel had fabricated the 'pick-up' story," a claim he returned to repeatedly in closing argument. (*Id.* at pp. 845-846.) The prosecutor stated, "'You might say to yourself, "The defendant's got a good story." Did you think he was going to come in here without a good story? He's had how long to prepare. . . . I don't want to imply that my colleague here, that he told him what to say, but he has the assistance of a lawyer.'" (*Id.* at p. 845.) Later, he said, "I've been a lawyer long enough [to know] that people don't hire lawyers just to give them money to make them rich. I'm saying that merely because he had a lawyer—that's what I'm saying. Now if that shoe fits, he can wear it." (*Ibid.*) The Supreme Court concluded these comments constituted misconduct because they attacked the attorney's conduct, not his arguments, and there was "no evidence to support the claim that defense counsel fabricated the defense."[4] (*Id.* at p. 847.)

Here, the prosecutor did not accuse defense counsel of lying or fabricating a story for Pereyra to use as a defense. Instead, he characterized certain evidence-based defense arguments as "smoke screens" or "sidetracks." In effect, he told the jury that the issues defense counsel had raised were distractions from the real issues and the most important

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[4] *People v. Charlie* (1917) 34 Cal.App. 411, 415 is inapposite for the same reason; it also involved baseless assertions that defense counsel had fabricated a false defense story for defendant. *People v. Jones* (1997) 15 Cal.4th 119, on which Pereyra also relies, does not require a different result. There, the Supreme Court held it "was improper for the prosecutor to accuse opposing counsel of lying to the jury and to state that defense counsel's credibility was damaged because he was not candid with the jury." (*Id.* at p. 168.) The prosecutor in this case did not accuse defense counsel of dishonest conduct.

evidence. Nothing about those comments constitutes an attack on defense counsel. We therefore conclude the prosecutor's comments in this case do not implicate the rule against disparaging defense counsel.

7. *Cumulative effect of errors*

Defendant contends the cumulative effect of these errors violated his due process rights by rendering his trial fundamentally unfair. Having found no errors, there could be no cumulative effect.[5] (See *People v. Kipp* (2001) 26 Cal.4th 1100, 1132.)

D. *Admission of Prior Strike Allegations*

Pereyra also appeals the imposition of 3 one-year sentence enhancements based on admissions he contends were inadequate to support enhancements under section 667.5, subdivision (b). He also contends he admitted the prison priors without being advised of his rights to confront witnesses and against self-incrimination.

[5] Pereyra also claims he received ineffective assistance of counsel because his trial attorney did not object to all of the instances of misconduct identified on appeal. Because we conclude there was no misconduct, we also conclude Pereyra did not receive ineffective assistance of counsel. (*People v. Osband* (1996) 13 Cal.4th 622, 690-691.)

1. *Background*

In the information, the prosecution alleged Pereyra had four prior convictions that qualify as prison priors. It alleged Pereyra was convicted of receiving stolen property (Pen. Code, § 496, subd. (a)), taking or driving a vehicle unlawfully (Veh. Code, § 10851), assaulting someone with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)), and obstructing an executive officer (Pen. Code, § 69). The prosecution appended to each substantive offense the allegation that Pereyra "thereafter served a separate term in state prison for said offense, and did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code section 667.5, subdivision (b)."

Prior to trial, Pereyra requested a separate bench trial on the allegations that he had prior convictions that qualified as prison priors. Defense counsel later indicated Pereyra made that choice to avoid having the jury hear about the prior convictions in the event he chose not to testify in his own defense. The trial court asked defense counsel to "take that waiver of the jury from [Pereyra] so we have that for the record." The following exchange ensued:

"[DEFENSE COUNSEL]: Mr. Pereyra, you have a right to a jury trial on the substantive criminal counts as well as the prior convictions, which are the prison priors. Do you waive your right to a jury trial as to your prior convictions, your four prison

priors under Penal Code section 667.5(b), such that you can have a bench trial, and it will be bifurcated from the jury? [¶] . . . [¶]

"DEFENDANT: Yes.

"THE COURT: Thank you. And Mr. Pereyra, I do note that you had a conversation with your attorney off the record. Did you need any more time to discuss this point with him, sir?

"DEFENDANT: No.

"THE COURT: You had the opportunity to have him answer all of the questions that you had, sir?

"DEFENDANT: Yes.

"THE COURT: Thank you. [¶] The Court is granting the request that the trial on the priors in this matter be bifurcated. The Court had a knowing and intelligent waiver of the jury for the trial on the priors."

After the close of the prosecution case, defense counsel notified the trial court Pereyra had decided to testify in his own defense. At the prosecution's request, the trial court determined it would allow evidence concerning three of the four alleged prison priors for impeachment purposes. The trial court also indicated it would take judicial notice of court records showing the convictions if Pereyra did not admit them. When Pereyra took the stand, defense counsel elicited his testimony concerning the three prior convictions:

"Q. Is it true that on July 5th, 1990, in the county of Riverside you were convicted of a felony crime of taking a vehicle unlawfully in violation of Penal Code section 10851?

"A. A vehicle in 1990?

"Q. Yes.

"A. I think I was convicted of it, yes.

"Q. And on February 16, 1993, were you convicted in the county of Riverside of a felony count of assault by force likely to produce great bodily injury in violation of Penal Code section 245(a)(1)?

"A. Yes, I was.

"Q. And on May 11, 2011, in the county of Riverside, were you convicted of a felony crime of obstructing an executive officer in violation of Penal Code section 69?

"A. I was—I went to trial on that, which—

"Q. You don't need to get into the details, sir. I just need to know if you were convicted. That's all I need to know.

"You were convicted?

"A. Through the judge, yes, I was convicted."

On cross-examination, the prosecution clarified Pereyra was convicted of taking a vehicle in 1990:

"Q. When [defense counsel] was going through the three felony convictions you have, the first one he asked you if you had been convicted in 1990 of the grand theft auto. You said you think you did. Is it that you think you did or you actually did?

"A. I was convicted of it."

After the jury returned its verdict, the trial court raised the issue of "set[ting] this matter for trial on the priors, since that issue was bifurcated." Defense counsel responded that Pereyra admitted the priors on the stand and represented that Pereyra "would just like to submit on the priors, your Honor. He is not contesting the priors at this time. He is submitting that the priors are true and he actually suffered those priors, so he is not contesting them at this time. The purpose of the bifurcation was to keep it out in case he didn't testify, but he did testify." The trial court confirmed Pereyra meant to *admit* the prison priors, not *submit* to them. It then engaged Pereyra in the following colloquy:

"THE COURT: I just want to ask, Mr. Pereyra, you had the full opportunity to discuss these points with your attorney, sir?"

"DEFENDANT: Yes.

"THE COURT: Do you need any additional time to talk with him about your admission to the priors?

"DEFENDANT: No, I do not.

"THE COURT: Do you have any questions that you still need to ask him with regard to this point?

"DEFENDANT: No, I do not."

The trial court found "the priors true based on the admissions of the defendant. The Court finds the first prior true as alleged, the second prior true as alleged, [and] the third prior true as alleged."[6]

2. *Adequacy of prison prior admissions*

Pereyra contends his admissions regarding his three prior convictions were not sufficient to impose one-year sentence enhancements because he admitted only suffering the convictions, not serving prison terms and not failing to remain offense-free and out of prison for five years.

Imposing a sentence enhancement under section 667.5, requires proof the defendant "(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) The information alleged all the necessary elements for a prison prior enhancement under section 667.5, subdivision (b). For each of the four alleged prior convictions, the information alleged Pereyra was convicted of the substantive offense, served a separate term in state prison, and failed to satisfy the five-year washout period as specified in section 667.5, subdivision (b).

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[6] The trial court also found a fourth prior true as alleged, but later reduced it to a misdemeanor under section 1170.18, subdivision (f) and ordered it stricken as a prison prior.

At the opening of the defense case at trial, Pereyra admitted the fact he had three prior felony convictions. However, neither defense counsel nor the prosecution asked whether Pereyra was imprisoned as a result of those convictions, whether he completed the terms of imprisonment, or whether he failed to remain conviction-free for the five-year statutory washout period.

After the jury returned its verdict, however, the trial court and the parties revisited the issue of the prison priors. The trial court asked about scheduling a bench trial to prove the prison priors as alleged, but defense counsel indicated no trial would be necessary. Defense counsel represented that "on the stand—[Pereyra] testified, obviously. He admitted the priors. He would just like to submit on the priors, your Honor. He is not contesting the priors at this time. He is submitting that the priors are true and he actually suffered those priors, so he is not contesting them at this time." The trial court asked Pereyra whether he had discussed admitting the prison priors with his counsel and whether he needed additional time to discuss the admissions. Pereyra responded that he had discussed the issue and did not need additional time. The trial court found "the priors true based on the admissions of the defendant. The Court finds the first prior true *as alleged*, the second prior true as alleged, [and] the third prior true as alleged," and Pereyra did not object to the finding.

We conclude Pereyra admitted the prison priors as alleged in the information, which included all the elements necessary to support the enhancements. As a general matter, "admission of . . . prior convictions is not limited in scope to the fact of the

convictions but extends to all allegations concerning the felonies contained in the information." (*People v. Ebner* (1966) 64 Cal.2d 297, 303.) Moreover, as a factual matter, the only reason the trial court raised the issue of scheduling a bench trial on the prior convictions is Pereyra's trial testimony about his prior convictions did not establish he had served prison terms or failed to satisfy the five-year washout period after release. By telling the trial court he wished to admit the prison priors, Pereyra was admitting those other elements, which eliminated the need for further proceedings.

People v. Greenwell (1962) 203 Cal.App.2d 1 (*Greenwell*) is not to the contrary. In *Greenwell*, the record showed that, for each of three convictions, defendant was directed to "the precise wording of the charge, both as to the offense named and as to the service of sentence therefor. . . . He was then asked as to each whether or not he had suffered the alleged prior conviction." (*Id.* at p. 3.) As to two of the convictions, he answered in the affirmative. Though he also admitted the third conviction, he "stated that he had served no sentence thereon because he was at liberty on an appeal bond both at the time of the offense charged in the present case and at the time of trial." (*Ibid.*) The Court of Appeal affirmed the finding that defendant was a habitual criminal on the basis of the first two prior convictions, but ordered stricken from the judgment's recital of the former convictions the description of the third conviction, because there was "no admission, nor any evidence, that appellant served a prison term" on that conviction. (*Id.* at p. 6.) Pereyra's case is different because Pereyra came back and formally admitted the prison priors as alleged after trial. Thus, while the facts of the initial admission parallel the facts

in *Greenwell*, in this case the prosecution and the court closed the loop and obtained the necessary admission as to all elements of the enhancement.

People v. Lopez (1985) 163 Cal.App.3d 946, on which Pereyra relies, does not require a different result. In *Lopez*, the Court of Appeal held the evidence was insufficient to support the defendant's prior convictions for serious felonies because the complaint did not allege and the defendant did not admit the prior burglaries were residential. (*Id.* at p. 950.) Here, the information alleged all the elements required to expose Pereyra to prison prior enhancements under section 667.5, subdivision (b), and Pereyra admitted the prison priors as alleged.

3. *Boykin-Tahl warnings*

Pereyra contends the trial court did not adequately advise him of his constitutional rights to confront and cross-examine witnesses and the privilege against self-incrimination before taking his admissions on the prior strike allegations.

Under both the federal and state Constitutions, before a court accepts a guilty plea a defendant must be advised of his rights to confront witnesses against him and of the privilege against compelled self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238, 242; *In re Tahl* (1969) 1 Cal.3d 122, 132-133.) In California, the same rule applies to the acceptance of an admission of the truth of an alleged prior conviction. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) On appeal, if the express waivers were incomplete, both federal and state appellate courts review the record for affirmative evidence that the admission was voluntary and intelligent under the "totality of the circumstances." If so,

any error in the advisement before the waiver is deemed harmless. (*People v. Howard* (1992) 1 Cal.4th 1132, 1176, 1178 (*Howard*).)

In *Howard*, the trial court took explicit waivers of jury trial and confrontation rights, but failed to obtain a specific waiver of the privilege against self-incrimination. The California Supreme Court found that, under the totality of the circumstances, when the defendant admitted the prior convictions, his waivers represented "'a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (*Howard*, *supra*, 1 Cal.4th at p. 1177.) "[T]he absence of an express waiver of the privilege against self-incrimination does not lead us to conclude that defendant's admission of the prior was less than voluntary and intelligent. . . . '[A] plea of guilty is the most complete form of self-incrimination.'" (*Id.* at p. 1180.) By the plea, the defendant admits he is guilty of the charged offense. It is thus "'essential that the defendant know that he has a right not to plead guilty, and that the record show he knows it.' [Citation.] However, when the record demonstrates that knowledge there is 'no need to go farther and attach to such knowledge the talismanic phrase "right not to incriminate himself."' [Citations.]" (*Ibid.*)

Here, as in *Howard*, the trial court took an express waiver of the jury trial right.[7] Pereyra moved to bifurcate trial of the substantive charges and trial of the prison priors and requested a bench trial on the priors. At the court's direction, defense counsel advised Pereyra that he has a right to a jury trial on both the substantive criminal counts and the prior convictions, and Pereyra agreed that he "waive[d] [his] right to a jury trial as to [the] prior convictions, [the] four prison priors under Penal Code section 667.5(b)." The trial court found he had made a knowing and intelligent waiver of his right to a jury trial on the prison priors. Pereyra concedes he was advised of the right to a jury trial on the prison priors and that he waived that right.

However, the trial court failed to obtain express waivers of the associated rights against self-incrimination and to confront witnesses before accepting his admission that he had suffered prison priors within the meaning of section 667.5, subdivision (b). After the jury returned its verdict, the trial court raised with counsel the issue of when to set the bench trial on the prison priors. Defense counsel responded that Pereyra "would just like to submit on the priors, your Honor. He is not contesting the priors at this time. He is submitting that the priors are true and he actually suffered those priors, so he is not contesting them at this time." The trial court did not ask Pereyra specifically whether he waived his right to confront and cross-examine witnesses and his privilege against self-

[7] In cases where the court does not advise the defendant of the right to have a trial on an alleged prior conviction, "we cannot infer that in admitting the prior the defendant has knowingly and intelligently waived that right as well as the associated rights to silence and confrontation of witnesses." (*People v. Mosby* (2004) 33 Cal.4th 353, 362.)

incrimination. Instead, it asked Pereyra whether he had the opportunity to discuss admitting the priors with his attorney and whether he needed more time to discuss the matter with or had any further questions for his attorney. Pereyra responded he had consulted his attorney and did not need to do so further. The trial court found "the priors true based on the admissions of the defendant." The People concede the trial court failed to advise Pereyra of his right to remain silent and his right to confront and cross-examine witnesses against him.

Although the trial court did not expressly advise Pereyra of his right to confront witnesses and his right against self-incrimination, the record supports a reasonable inference that Pereyra was aware of those rights. (*Howard*, *supra*, 1 Cal.4th at p. 1180.) Pereyra chose to admit the fact of the convictions after the close of the prosecution's case, and admitted the other elements of the prison priors as alleged after trial. We think it is virtually inconceivable that a defendant who has been advised of his right to a jury trial on prison priors, has just observed a trial in which his counsel confronted and cross-examined witnesses, and then made an affirmative choice to waive his privilege against self-incrimination by testifying in his own defense, would not understand that by waiving a bench trial on prior conviction allegations, he was giving up the associated rights to silence and confrontation of witnesses with respect to those allegations. (See *People v. Mosby*, *supra*, 33 Cal.4th at p. 364 ["Here, defendant, who was represented by counsel, had *just* undergone a jury trial at which he did not testify, although his codefendant did. Thus, he not only would have known of, but had just exercised, his right to remain silent

at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation"].) Based on the totality of those circumstances, we conclude the error was harmless.

III

DISPOSITION

We affirm the judgment and the sentence.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SLOUGH
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.